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## Judicial Law-Making and the Developing Order of the Oceans

James Harrison,  
Graduate Student, Edinburgh Law School<sup>1</sup>

### ABSTRACT

This article explores the powers of courts and tribunals in developing the legal order of the oceans. It is generally accepted that the rules of treaty interpretation allow courts to look beyond the strict confines of a treaty to other sources of evidence. Such an approach allows an evolutionary interpretation which takes into account the contemporaneous views of the parties. In practice, courts and tribunals have adopted a pragmatic approach to the interpretation of the 1982 Law of the Sea Convention in light of other rules of international law. By doing so, they promote flexibility in the Convention regime, albeit at the risk of undermining the transparency and legitimacy of their decisions. In the context of the applicable law, the 1982 Convention seeks to safeguard itself against change by asserting priority over other sources of law. From a practical perspective, the role of courts in developing the Convention is limited by the fact that few decisions have come before the courts to date. Thus, it is clear that courts by themselves cannot provide a satisfactory mechanism for change in the legal order of the oceans.

### Judges as Law-makers?

The proliferation of international courts and tribunals over the last two decades suggests a growing confidence in adjudication as a method of settling international disputes. Several major modern international conventions create systems of dispute settlement whereby powers of adjudication are conferred upon judicial bodies. Does this trend also suggest an increased acceptance of a more prominent and active role for courts and tribunals in developing international law? If so, what are the limits, if any, on judges fulfilling this role?

In the context of the law of the sea, third-party dispute settlement is said to play a key role in safeguarding the package deal that was achieved at the Third UN Conference on the Law of the Sea.<sup>2</sup> According to the oft-quoted

<sup>1</sup> Thanks to Professor Alan Boyle, Jill Robbie, and the anonymous reviewer for valuable comments on previous versions of this article. Naturally, any remaining mistakes are the author's responsibility.

<sup>2</sup> See, e.g., S. Rosenne and L. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. 5, (Martinus Nijhoff, 1989), at p. 5; A. E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction," (1997) 46 *International and Comparative Law Quarterly* 37-54, at p. 38.

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speech by the President of that Conference, “the provision of effective dispute settlement procedures is essential for stabilizing and maintaining the compromises necessary for the attainment of agreement on a convention. Dispute settlement will be the pivot upon which the delicate equilibrium must be balanced.”<sup>3</sup> By conferring jurisdiction on courts and tribunals for the settlement of certain types of dispute, the 1982 Law of the Sea Convention<sup>4</sup> assures a significant role for such organs in settling law of the sea disputes.<sup>5</sup> Conceived of as guardians of the package deal, the function of the courts would appear to be one of upholding the *status quo* and preserving the balance of interests as it was struck in 1982. However, in the words of Jenks, “stability and the protection of acquired rights are essential functions of any legal system, but no legal system can protect itself against revolution except by providing adequate scope for evolutionary change.”<sup>6</sup> This article will explore the extent to which courts and tribunals can act as an engine of change under the LOS Convention.

Courts are an important mechanism for change in international law, given the general absence of standing legislative organs. Strictly speaking, of course, judges are not law-makers. Courts and tribunals do not make law in the same sense as legislators; they do not create law *de novo*. Their law-making role is much more limited.

First and foremost, international judicial decisions do not have any binding force beyond the parties to a dispute.<sup>7</sup> Nevertheless, this formal status does not fully capture the significance of the judgments of international courts and tribunals. It is well established in principle and in practice that judicial organs are likely to follow their own decisions, unless there are compelling grounds to depart from them.<sup>8</sup> It follows that judicial decisions which interpret and apply the LOS Convention will be significant for all parties thereto and not only for the states involved in a particular dispute.

Second, courts are largely guided by the submissions of the parties to a dispute. The *non ultra petita* rule restricts a court to deciding those questions that have been brought before it by the litigants.<sup>9</sup> However, in the *Arrest Warrant Case*, the International Court of Justice<sup>10</sup> clarified that “while the Court is thus

<sup>3</sup> See Rosenne and Sohn (eds.), *supra*, note 2, at p. 10.

<sup>4</sup> *United Nations Convention on the Law of the Sea* (1982) 21 International Legal Materials 1261. Hereinafter referred to as the ‘LOS Convention’.

<sup>5</sup> For a discussion of the limits of dispute settlement under the LOS Convention, see generally N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005).

<sup>6</sup> W. C. Jenks, *The Common Law of Mankind* (Stevens, 1958), at p. 85.

<sup>7</sup> LOS Convention, Article 296(2).

<sup>8</sup> See, e.g., H. Lauterpacht, *The Development of International Law by the International Court* (Stevens, 1958), at p. 14.

<sup>9</sup> For the *locus classicus* of the rule, see *Asylum Case (Colombia v. Peru) Judgment of 20 November 1950* (1950) ICJ Reports 395, at p. 402.

<sup>10</sup> Hereinafter referred to as the ‘ICJ’.

not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning.”<sup>11</sup> As it is the persuasiveness of the court’s reasoning rather than its formal power that provides the authority for its decisions, the *non ultra petita* rule does not necessarily restrict the ability of courts and tribunals to develop the law.

Third, courts and tribunals are also constrained by general principles of treaty interpretation and application. It is these principles which determine the proper function of a court or tribunal in developing international law and they are the principal subject of analysis in this article. How far do these general principles allow judges to act as law-makers? Do they provide sufficient guidance to judges on the limits of legitimate judicial law-making?

### Outline of the Law of the Sea Convention Dispute Settlement Procedures

The LOS Convention does not create a single dispute settlement organ competent to decide all ocean disputes; rather it permits states to choose from a list of organs that includes the ICJ, the International Tribunal for the Law of the Sea,<sup>12</sup> and arbitration or special arbitration.<sup>13</sup> In the absence of agreement, arbitration is the default forum for dispute settlement.<sup>14</sup>

Whilst the Convention confers compulsory jurisdiction on courts and tribunals for the settlement of many disputes arising thereunder, certain disputes are excluded from judicial scrutiny altogether. As stated by one leading commentary on the Convention, “the acceptance by many participants [at the Third UN Conference on the Law of the Sea<sup>15</sup>] of the provisions for the settlement of disputes relating to the interpretation of the LOS Convention was, from the very beginning, conditioned on the exclusion of certain issues from the obligation to submit them to a procedure entailing a binding decision.”<sup>16</sup> Article 297 excludes *a priori* certain categories of dispute from binding dispute settlement, whereas Article 298 sets out a list of optional exceptions which States may invoke through a written declaration at any time prior to the initiation of dispute settlement proceedings.<sup>17</sup> Furthermore, states may under certain circumstances agree to exclude the procedures in Part XV of the Convention by submitting a dispute to an alternative dispute settlement procedure. Article 280 thus provides that “nothing in this Part impairs the right of any States Parties to agree

<sup>11</sup> *Arrest Warrant Case (Congo v. Belgium) Judgment of 14 February 2002* (2002) ICJ Reports 3, at para. 43.

<sup>12</sup> Hereinafter referred to as the ‘ITLOS’.

<sup>13</sup> LOS Convention, Article 287(4).

<sup>14</sup> *Ibid.*, Article 287(5).

<sup>15</sup> Hereinafter referred to as the ‘Third LOS Conference’.

<sup>16</sup> Rosenne and Sohn (eds.), *supra*, note 2, at p. 87.

<sup>17</sup> LOS Convention, Article 298(5).

at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.” Indeed, it would appear that this provision permits states to avoid the judicial settlement of disputes altogether if they so agree.<sup>18</sup>

The procedures in Part XV of the LOS Convention are designed to settle disputes that arise under the Convention. Article 288 sets out the jurisdictional powers of the dispute settlement organs acting under the Convention. It provides that “a court or tribunal referred to in Article 287 shall have jurisdiction over any dispute concerning the interpretation and application of this Convention which is submitted to it in accordance with this Part.” This provision limits jurisdiction to disputes relating to the interpretation and application of the LOS Convention and claims can only be brought under other agreements if those agreements specifically provide for the submission of disputes to the LOS Convention procedures.<sup>19</sup> This confirms the fundamental principle of international dispute settlement that jurisdiction is founded on the consent of states.<sup>20</sup>

### Interpretation as a Tool of Judicial Development

Whilst jurisdiction defines the scope of a court’s powers, it does not specify how a court should perform its judicial functions. This issue depends on other rules of international law relating to the interpretation and application of treaties.

#### General Rules of Interpretation

One of the principal tasks of a judicial organ acting under Part XV is interpreting the LOS Convention. The act of interpretation confers a degree of discretion on courts and tribunals as there is rarely a single meaning to be attributed to the text of a treaty.<sup>21</sup> It is through this discretion that the courts are able to develop the normative content of the Convention.

<sup>18</sup> Rosenne and Sohn (eds.), *supra*, note 2, at p. 24. See also the *Southern Bluefin Tuna Arbitration (Australia and New Zealand v. Japan) Award on Jurisdiction and Admissibility* (2000) 39 International Legal Materials 1359.

<sup>19</sup> LOS Convention, Article 288(2). A number of other treaties in fact do so: 1995 Fish Stocks Agreement, 1996 Protocol to the London Dumping Convention, 2001 Convention on the Conservation and Management of Fisheries Resources in the South East Atlantic Ocean, 2000 Western and Central Pacific Fisheries Convention, 2000 Galapagos Agreement, 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, and 2001 UNESCO Underwater Cultural Heritage Convention. There is a full discussion of these agreements in T. Treves, “A System for Law of the Sea Dispute Settlement,” in D. Freestone, R. Barnes and D. Ong (eds.), *The Law of the Sea: Progress and Prospects* (Oxford University Press, 2006), at pp. 417–432.

<sup>20</sup> *Advisory Opinion on the Status of Eastern Carelia* (1923) PCIJ Reports (Ser. B) 7, at p. 27.

<sup>21</sup> See M. S. McDougal, H. D. Lasswell, and J. C. Miller, *Interpretation of Agreements and World Public Order* (Yale University Press, 1967), at p. 361. See also H. A. Hart, *The Concept of Law*, 1st ed., (Oxford University Press, 1961), at p. 271.

In the case of the LOS Convention, there is arguably an even greater need for interpretation as ambiguity arises not only because of the inherent flexibility of language itself, but because of the deliberate strategy of the drafters to produce a compromise that was acceptable to as many states as possible. Whilst it is common in treaty negotiations for differences of opinion to be blurred by drafting techniques, this trend was accentuated by the consensus decision-making procedures adopted at the Third LOS Conference.<sup>22</sup> Thus, Shearer describes how “on certain critical points, disagreement was papered over by compromises or disguised by opaque texts that elude clear meaning.”<sup>23</sup>

The discretion of an interpreter is not, however, complete. The task of interpretation was described by one arbitral tribunal as being to “establish with the maximum possible certainty what the common intention of the Parties was.”<sup>24</sup> Another author depicts the aim of interpretation as to “achieve the closest possible approximation to the genuine shared expectations of the parties.”<sup>25</sup> Thus, a court should not impose its own subjective interpretation of an ambiguous text. Interpretation is a quest to discover how the parties to a treaty would have interpreted the treaty in those circumstances.

In this quest, adjudicators are guided by the rules on treaty interpretation which are found in the 1969 Vienna Convention on the Law of Treaties.<sup>26</sup> The general rule is stated in Article 31 which starts: “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Whilst this principle stresses the importance of the text, it does not necessitate a purely literal interpretation of the text. As the arbitral tribunal noted in the *Methanex Case*, “there is a difference between a literal meaning and the ordinary meaning of a legal phrase” and the tribunal further stressed the importance of considering the meaning of a word in its context and in light of the object and purpose of the treaty.<sup>27</sup>

An overly textual approach to interpretation is particularly inappropriate in the case of the LOS Convention. Although the Convention is in one sense simply a legal text, the overtly political nature of the negotiations which preceded its adoption should not be forgotten. As noted above, the treaty was not

<sup>22</sup> See generally, B. Buzan, “Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea,” (1981) 75 *American Journal of International Law* 324–348.

<sup>23</sup> I. Shearer, “Oceans Management Challenges for the Law of the Sea in the First Decade of the 21st Century,” in A. Oude Elferink and D. Rothwell (eds.), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Koninklijke Brill NV, 2004), at p. 4.

<sup>24</sup> *Air Transport Agreement Arbitration (US v. France)* (1963) 38 *International Law Reports* 182, at p. 229.

<sup>25</sup> McDougal, Lasswell and Miller, *supra*, note 21, at pp. 82–83.

<sup>26</sup> *1969 Vienna Convention on the Law of Treaties* (1969) 8 *International Legal Materials* 689.

<sup>27</sup> *Methanex Partial Award* (2002) at para. 136. Available at <<http://www.state.gov/s/l/c5818.htm>> (checked 30 January 2007).



necessarily drafted to be as accurate as possible, but rather to be as acceptable to as many states as possible. Whilst a drafting committee was appointed by the Third LOS Conference, it was not possible to solve all problems submitted to it.<sup>28</sup> As a consequence, one author concludes that “use of the same word in different provisions is, unusually, not necessarily intended to have the same consequence, and use of different words is not necessarily intended to have different consequences in every case.”<sup>29</sup> The Convention must be interpreted with these considerations in mind. In these circumstances, the context and object and purpose of the Convention assume a still greater importance.

One objective of the Convention that may prove particularly useful in its interpretation is the desire of the drafters to create a single, comprehensive treaty settling all issues relating to the law of the sea.<sup>30</sup> Such an objective not only underlines that the Convention must be interpreted as a whole, but that competing interests must be balanced by the interpreter.

The importance of balancing competing interests is illustrated by some of the decisions of the ITLOS on prompt release. For instance, in its judgment in *The Monte Confurco*, the Tribunal held that “the object of article 292 of the Convention is to reconcile the interest of the flag State to have its vessel and its crew released promptly with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties.”<sup>31</sup> In *The Camouco*, Judge Treves emphasised the need for balance in the following terms: “The Tribunal should not give preference to one or the other of these two points of view . . . both find their legitimacy in the Convention.”<sup>32</sup>

The balancing of interests can also be seen in the Tribunal’s decision in the same case on whether or not an obligation to exhaust local remedies should be read into Article 292. The Tribunal stressed that “no limitation should be read into article 292 that would have the effect of defeating its very object and purpose . . . article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period.”<sup>33</sup> In other words, applying the

<sup>28</sup> See D. Nelson, “The Work of the Drafting Committee,” in M. H. Nordquist *et al.* (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. 1 (Martinus Nijhoff, 1985), at p. 144.

<sup>29</sup> G. Plant, “The Third United Nations Conference on the Law of the Sea and the Preparatory Commission: Models for United Nations Law-Making?” (1987) 36 *International and Comparative Law Quarterly* 525–558, at p. 548.

<sup>30</sup> LOS Convention, Preamble.

<sup>31</sup> *The Monte Confurco (Prompt Release) (Seychelles v. France) Judgment of 18 December 2000* (2000) 125 *International Law Reports* 203, at paras. 71 and 72; repeated in *The Camouco (Prompt Release) (Panama v. France) Judgment of 7 February 2000* (2000) 125 *International Law Reports* 151, at para. 57. See also the Dissenting Opinion of Vice-President Wolfrum and Judge Yamato in *The M/V “Saiga” (Prompt Release) Judgment of 4 December 1997* (1997) 110 *International Law Reports* 736, at para. 9.

<sup>32</sup> See the Dissenting Opinion of Judge Treves in *The Camouco*, *supra*, note 31, at para. 6.

<sup>33</sup> See *The Camouco*, *supra*, note 31, at para. 58.

local remedies rule to prompt release cases would tip the balance against shipowners, as the safeguard afforded by Article 292 would offer limited protection if it was first necessary to pursue a case through local courts.<sup>34</sup> Similarly, in *The M/V "Saiga" (Prompt Release)* the Tribunal refused to accede to the argument of Saint Vincent and the Grenadines that the release of the vessel should be ordered without the posting of any bond at all. It held that "the posting of a bond or security seems to the Tribunal necessary in view of the nature of the prompt release proceedings."<sup>35</sup> For the Tribunal, the posting of a bond was an important factor in the balance of rights and obligations between coastal states and flag states and the Tribunal rejected an interpretation which would have unduly upset one side of that balance.

Of course, it is not always obvious where the balance should be struck and competing views may arise. Such was the case in *The Volga*, where the Tribunal had to decide whether the concept of a reasonable bond should be interpreted to permit non-pecuniary conditions. The Tribunal reasoned that "where the Convention envisages the imposition of conditions additional to a bond or other financial security, it expressly states so."<sup>36</sup> Furthermore, in its opinion, the imposition of such a bond would defeat the object and purpose of Article 73(2) which was to "provide the flag state with a mechanism for obtaining the prompt release of a vessel and crew arrested for alleged fisheries violations by posting a security of a financial nature whose reasonableness can be assessed in financial terms."<sup>37</sup> Criticising the decision of the majority, Judge Anderson, however, noted that the description of the object and purpose of Article 73(2) was overly one-sided: "an additional element in the object and purpose is to provide the safeguard for the coastal state . . ." He concluded that "to the extent to which there is some sort of balance in these provisions between the interests of the two states concerned, that balanced treatment should not be tilted in favour of one or the other."<sup>38</sup> Judge *ad hoc* Shearer, who also dissented, urged recognition of the fact that the context of illegal and unregulated fishing had changed since the conclusion of the LOS Convention and "a new "balance" has to be struck between vessel owners, operators and fishing companies on the one hand, and coastal States on the other."<sup>39</sup>

This case illustrates a particular difficulty that can arise for a court in interpreting a treaty of unlimited duration. In these circumstances, the expectations of the parties may change over time and therefore the balance to be made may

<sup>34</sup> On the ordinary meaning of the text, this was not necessarily the only interpretation. For an alternative argument, see the Dissenting Opinion of Judge Anderson in *The Camouco*, *supra*, note 31, at pp. 1–2.

<sup>35</sup> *M/V "Saiga" (Prompt Release)*, *supra*, note 31, at para. 81.

<sup>36</sup> *The Volga (Prompt Release) (Russia v. Australia) Judgment of 23 December 2002* (2003) 42 International Legal Materials 159, at para. 77.

<sup>37</sup> *Ibid.*

<sup>38</sup> Dissenting Opinion of Judge Anderson in *The Volga*, *ibid.*, at para. 18.

<sup>39</sup> Dissenting Opinion of Judge *Ad Hoc* Shearer in *The Volga*, *ibid.*, at para. 19.



be different to that prevailing at the time when the treaty was concluded. In this context, is a court permitted to take into account changes in the attitudes of the parties? If so, how does a court determine an appropriate interpretation of the treaty without overstepping its judicial function?

Where to strike the balance between the competing interests of states may be helped by reference to other sources of evidence as to what their expectations are. As Judge Mensah notes, "it is neither reasonable nor possible for the Tribunal to confine itself in every case to the bare language of the Convention's provisions. It is permitted, indeed required, to "flesh out" the bones of the provisions to the extent necessary in the circumstances in order to attain the object and purpose of the provisions in question."<sup>40</sup> We now turn to the question of what extrinsic evidence a court may invoke in order to establish the expectations of the parties.

### Travaux Préparatoires

One source which will certainly offer an insight into the intentions of the parties to a treaty is the records of the discussions that took place during negotiations of the text. Yet the use of *travaux préparatoires* in the interpretation of a treaty is an issue that has long been the subject of controversy and debate by courts and commentators. Indeed, Article 32 of the Vienna Convention on the Law of Treaties pointedly classifies the preparatory materials of a treaty as a "supplementary" source of interpretation.<sup>41</sup> The argument against relying on *travaux préparatoires* is forcefully made by Fitzmaurice, who says, "[they] are often extremely confused and confusing. They usually contain material supporting both the points of view in issue . . . states come to a conference with many views and intentions that are subsequently abandoned in the course of the conference; but it is not always clear that they were abandoned, and they may remain on the records as representing a view apparently maintained throughout."<sup>42</sup> Indeed the argument against referring to preparatory materials may be stronger still in the case of some multilateral treaties which have a law-making character.<sup>43</sup> In the *Advisory Opinion on Reservations to the Genocide Convention*, Judge Alvarez took the view that "[multilateral] conventions [of a legislative character] must not be interpreted with reference to the preparatory work which preceded them, they are distinct from that work and they have acquired a life of their own."<sup>44</sup>

<sup>40</sup> Declaration of Judge Mensah in *The Camouco*, *supra*, note 31, at para. 4.

<sup>41</sup> 1969 *Vienna Convention on the Law of Treaties*, *supra*, note 26, Article 32.

<sup>42</sup> G. G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points," (1951) 28 *British Yearbook of International Law* 1-28, at p. 15.

<sup>43</sup> A. McNair, "The Functions and Differing Legal Character of Treaties" (1930) 11 *British Yearbook of International Law* 100-118, at pp. 107-108.

<sup>44</sup> Dissenting Opinion of Judge Alvarez, in the *Reservations to the Genocide Convention Advisory Opinion* (1951) ICJ Reports 15, at p. 53.

It may be taking it too far to say that courts and tribunals should never have recourse to the negotiations of a treaty in its interpretation. Indeed, it is common for the ICJ and other courts and tribunals to take into account the *travaux préparatoires* as one means for supporting a particular interpretation.<sup>45</sup> Usually, such materials are invoked as support for an interpretation arrived at through other means, but Lauterpacht sceptically suggests that “it is not certain that the clarity of the meaning said to have been confirmed by the preparatory work was not actually due to the illumination obtained by the study of the latter.”<sup>46</sup> However, it should also be noted that the views expressed in the *travaux préparatoires* may no longer be held by states. Giving too much weight to preparatory materials may lead to a static interpretation of a treaty text fixed at the time of its conclusion. Therefore, preparatory materials must be considered in light of other contemporaneous sources of evidence as to the expectations of the parties.

In the case of the LOS Convention, reliance on preparatory materials raises other difficulties. Many of the negotiations at the Third LOS Conference took place in off-the-record sessions and there are no comprehensive official preparatory materials available to aid in interpretation. As a consequence, Plant argues that there is a need for “a more liberal, process-orientated approach.” He continues, “interpreters . . . should be prepared to look at all formal and informal statements, interventions, texts and proposals made at all stages and in all forums of the negotiation, including informal extra-conference groups, as aids to interpretation of the Convention.”<sup>47</sup> Furthermore, he argues that a special emphasis should be placed on the opinions and writings of the delegates who attended the Third LOS Conference: “The delegates and the relevant supporting staff in their ministries are peculiarly placed to know the background of a provision, and their views, in so far as they are able and prepared to make them public—and in many cases they are not—should be particularly influential upon interpretations of the [LOS Convention].”<sup>48</sup> However, such sources should nevertheless be treated with caution. There is a danger that the opinions of delegates may only provide a partial account of the negotiations; all delegates, including the officers of the Conference, were, after all, acting on behalf of their governments.

In practice, decisions of the Tribunal have not extensively relied on preparatory materials, although individual judges of the ITLOS have been willing to cite official and unofficial records of the Third LOS Conference in order to support a particular interpretation. For instance, in *The M/V “Saiga” (Prompt*

<sup>45</sup> *Arbitral Award on Pollution of the Rhine (Netherlands v. France)* (2004) at para. 70. Available at <<http://www.pca-cpa.org/ENGLISH/RPC/PBF/Sentence%20I.pdf>> (checked 30 November 2006).

<sup>46</sup> Lauterpacht, *supra*, note 8, at p. 138.

<sup>47</sup> Plant, *supra*, note 29, at pp. 555–556.

<sup>48</sup> *Ibid.*, at p. 552.

*Release*), Judges Ndiaye, Nelson, Park, Rao and Vukas inquired into the legislative history of Article 292 in order to support their textual analysis of that provision.<sup>49</sup> Furthermore, the Virginia Commentary on the LOS Convention—a scholarly account of the drafting history penned by several prominent participants at the Conference—is seemingly treated by some judges as a quasi-official source for interpretative purposes.<sup>50</sup>

It should also be noted that it is not only the negotiations at the Third LOS Conference that may provide guidance as to the meaning of the LOS Convention. As some provisions of the LOS Convention are based on similar, if not identical, provisions of the 1958 Geneva Conventions on the Law of the Sea, the drafting history of these treaties may also be relevant. These materials are much more detailed than those of the Third LOS Conference, given that the articles were first prepared by the International Law Commission and then subjected to a more traditional conference procedure where all formal discussions were officially recorded. In *The M/V "Saiga" (No. 2)* the ITLOS relied on the work of the International Law Commission and the reports of the First UN Conference on the Law of the Sea in its interpretation of provisions which had been incorporated from the 1958 Convention on the High Seas.<sup>51</sup> Affirming the subsidiary role of *travaux préparatoires*, however, the drafting history was only invoked as confirmation of an interpretation arrived at through other means, including the subsequent views of states.<sup>52</sup>

#### Unilateral Statements and Declarations

Another factor that may be taken into account in the interpretative process is unilateral statements made by states at the time of signature, ratification or accession to the Convention.<sup>53</sup> In some circumstances, unilateral declarations may provide evidence in support of a particular interpretation. Often, however, an analysis of the declarations made by states only reveals strong disagreements over how the Convention should be interpreted.<sup>54</sup> One need only consider the diversity of opinions over the innocent passage of warships through

<sup>49</sup> See the Joint Dissenting Opinion of Judges Ndiaye, Nelson, Park, Rao and Vukas in *M/V "Saiga" (Prompt Release)*, *supra*, note 31, at paras. 23–26. It is notable that many of these judges were involved in the negotiations at the Third LOS Conference themselves as delegates. As noted by the President of the Tribunal, “there is no other international court whose judges were also draftsmen of the Convention that they were asked to interpret and apply,” *ITLOS Press Release of 27 March 2002*, ITLOS/Press64.

<sup>50</sup> E.g., Judge Laing makes numerous references to the Virginia Commentary in his separate opinions in *The M/V "Saiga" (No. 2) Judgment of 1 July 1999* (1999) 120 International Legal Materials 143, and in *Southern Bluefin Tuna Cases (Provisional Measures) (Australia and New Zealand v. Japan) Order of 27 August 1999* (1999) 117 International Law Reports 148.

<sup>51</sup> *The M/V "Saiga" (No. 2)*, *supra*, note 50, at paras. 80–82.

<sup>52</sup> For the other grounds of the decision, see discussion below in the present text under “Other Rules and Principles of International Law.”

<sup>53</sup> See LOS Convention, Article 310.

<sup>54</sup> For the text of the declarations, see the website of the UN Division for Ocean Affairs and Law of the Sea: <[www.un.org/depts/los](http://www.un.org/depts/los)>.

the territorial sea to realise that declarations could hinder rather than help a court come to an authoritative interpretation of the text.

In many cases, such statements are remarkably similar to statements made by delegates at the closing sessions of the Conference itself, so there is an overlap with the *travaux préparatoires* themselves. Indeed, as with *travaux préparatoires*, such declarations cannot constitute an authoritative interpretation of the Convention and they should be balanced against other sources of interpretation.

Unilateral interpretations and declarations may be relevant to the resolution of a dispute in another context. In the context of litigation, courts and tribunals have taken into account unilateral acts and statements made prior to a dispute<sup>55</sup> or in their oral pleadings.<sup>56</sup> It is suggested that declarations made under Article 310 of the LOS Convention may play a similar role in litigation, preventing a state from proposing an interpretation which is contrary to its Article 310 declaration. Nevertheless, this is only legitimate if it is clear that the declaration still represents the views of a state and the state involved has not since modified its position.

#### Other Rules and Principles of International Law

It has already been stressed that the expectations of the parties are not set in stone when a treaty is drafted and the circumstances in which a treaty was intended to apply may also change. In the words of Higgins, “the notion of ‘original intention’ has long been qualified by the idea that the parties themselves, because of the nature of the treaty that they agreed to, just have assumed that matters would evolve.”<sup>57</sup> Indeed, interpreting a treaty without regard to changes in the surrounding circumstances could threaten the ultimate viability of a treaty settlement. How does a court identify the current views of states on the interpretation of a treaty? Reference to other rules and principles of international law is one method which may help an adjudicator to identify the current expectations of the parties, thereby promoting the ongoing stability of the treaty settlement.

In some cases, the LOS Convention itself mandates the consideration of other rules of international law. Examples of a direct *renvoi* to other rules of international law are Articles 74(1) and 83(1) on maritime boundary delimitation which both refer to “international law as referred to in Article 38 of the Statute of the International Court of Justice.” As the Arbitral Tribunal said in

<sup>55</sup> See, e.g., *The M/V “Saiga”* (No. 2), *supra*, note 50, at paras. 69 and 71.

<sup>56</sup> *Dispute Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf (Barbados v. Trinidad and Tobago)* (2006) at para. 88. Available at <http://www.pca-cpa.org/ENGLISH/RPC/BATRI/BATRI%20Award.pdf> (Checked 30 November 2006); *MOX Plant Case (Provisional Measures) Order of 3 December 2001* (2002) 41 *International Legal Materials* 405, at paras. 78–81.

<sup>57</sup> R. Higgins, “A Babel of Judicial Voices? Ruminations from the Bench,” (2006) 55 *International and Comparative Law Quarterly* 791–804, at pp. 797–798.

the *Barbados—Trinidad Arbitration*, “this apparently simple and imprecise formula allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules.”<sup>58</sup> Similarly, many of the provisions on the prevention of marine pollution make reference to generally accepted international rules and standards.<sup>59</sup> These provisions allow the Convention to develop over time without requiring formal amendment or modification by the States Parties.

In other cases, reference to other rules and principles of international law may be possible under general principles of interpretation. Recognition that an instrument must be interpreted in light of the context at the time of its interpretation is found in two paragraphs of Article 31 of the Vienna Convention on the Law of Treaties.

First, Article 31(3)(b) obliges an interpreter to take into account the “subsequent practice in the application of a treaty” where it amounts to an “agreement of the parties regarding its interpretation.” The commentary to this Article makes clear that the practice must establish the agreement of all parties to the treaty, although it is not necessary for the practice to be attributable to all those parties.<sup>60</sup> ‘Practice’ is not defined by the Vienna Convention on the Law of Treaties, but it should arguably be considered as a flexible concept, as long as it demonstrates the opinions of the parties. It conceivably includes both physical practice as well as the adoption of international instruments, including non-binding resolutions and declarations. In particular, the decisions of organs created by the treaty will be highly pertinent. It is on this basis that decisions of the Meeting of the States Parties to the LOS Convention may be relevant to the interpretation of the Convention. Although the United Nations General Assembly has no formal role under the Convention, its annual resolutions on the law of the sea may arguably also provide important context for its interpretation, as it includes all States Parties to the LOS Convention, as well as other important maritime states.

Nor is it only decisions adopted by intergovernmental institutions that may be relevant under this provision. One illustration is the Rules of the Tribunal adopted by the ITLOS.<sup>61</sup> The Rules are authorized by Article 16 of the Statute of the Tribunal and they were drafted exclusively by the Members of the

<sup>58</sup> *Dispute Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf*, *supra*, note 56, at para. 222.

<sup>59</sup> E.g., LOS Convention, Articles 211, 220.

<sup>60</sup> “Draft Articles on the Law of Treaties: Report of the International Law Commission to the General Assembly,” (1966—II) *Yearbook of the International Law Commission*, at p. 220.

<sup>61</sup> The Rules of the Tribunal are contained in document ITLOS/8, adopted on 28 October 1997, as amended on 15 March and 21 September 2001.

Tribunal without any input from States Parties. Nevertheless, the Rules have been invoked by the ITLOS as context for the interpretation of the LOS Convention. In *The Camouco*, the Tribunal interpreted Article 292 of the Convention by reference to Article 113 of its Rules in order to support its conclusion that an applicant must show that its arguments are “well founded.”<sup>62</sup> In the same case, the dissenting opinion of Judge Wolfrum also argued that the Rules guided the Tribunal in what to take into account in determining the reasonableness of a bond, because they require the detaining state to provide information on the value of the ship and on the amount of the requested bond.<sup>63</sup> Presumably, the Rules are a valid source of interpretative material because they have been authorised by the Convention and the ITLOS judges are elected by the States Parties themselves. In this context, it is also possible that some decisions by the Commission on the Limits of the Outer Continental Shelf may also be taken into account in the interpretative process.

Second, Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides that an interpreter shall take into account “any relevant rules of international law applicable in the relations between the parties.” This provision allows recourse to other sources of extrinsic evidence that may not be directly related to the treaty itself, but are nevertheless relevant.<sup>64</sup> Relevance will often depend on the particular context of a treaty and the provisions being interpreted. Article 31(3)(c) does not expressly say whether the rules of international law it refers to are those at the time of conclusion or at the time of interpretation and it appears that the International Law Commission deliberately left this issue open, saying “the relevance of international law for the interpretation of treaties in any given case was dependent on the intentions of the parties.”<sup>65</sup>

A so-called evolutionary approach to interpretation was adopted by the ICJ in the *Namibia Advisory Opinion*, where the Court was faced with interpreting and applying Article 22 of the Covenant of the League of Nations and the text of the Mandate for South West Africa, virtually fifty years since their promulgation and in a different institutional context. The Court held that certain concepts connected with the Mandate system were “by definition evolutionary” and the parties must be “deemed to have accepted them as such.”<sup>66</sup> It followed that the Court had to “take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain

<sup>62</sup> *The Camouco*, *supra*, note 31, at para. 49. See in particular the Declaration of Judge Mensah, in *ibid.*, at para. 4.

<sup>63</sup> See the Dissenting Opinion of Judge Wolfrum in *The Camouco*, *ibid.*, at para. 2.

<sup>64</sup> See C. McLachlan, “The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties,” (2005) 54 *International and Comparative Law Quarterly* 279–320.

<sup>65</sup> “Draft Articles on the Law of Treaties: Report of the International Law Commission to the General Assembly,” *supra*, note 60, at p. 222.

<sup>66</sup> *Namibia Advisory Opinion* (1971) ICJ Reports 3, at p. 31; see also *Case Concerning the Gabčíkovo-Nagymaros Project* (1997) ICJ Reports 7, at pp. 76–80.



unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary international law.”<sup>67</sup> In a more recent decision, the arbitral tribunal in the *Iron Rhine Railway Arbitration* appeared to adopt a more general approach to evolutionary interpretation, holding that “in the present case, it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway. But here, too, it seems that an evolutive [*sic*] interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule.”<sup>68</sup> It would seem that the basis of the Tribunal’s reasoning in this case is the fact that the treaty was not intended to govern the relationship between the two states for a “limited or fixed duration”<sup>69</sup> only and therefore it was necessary that it was applied in light of contemporaneous concerns.<sup>70</sup> Higgins notes that “this same trend is discernable across courts, tribunals and arbitration tribunals”<sup>71</sup> and it is likely that courts will increasingly adopt an evolutionary approach to interpretation.

Precisely which rules of international law are relevant under Article 31(3)(c) is the subject of some controversy. Some commentators claim that only those rules of international law which are binding on all the parties to the treaty can be invoked in aid of interpretation.<sup>72</sup> McLachlan explains that this is necessary so that an interpretation imposes consistent obligations on all the parties to it.<sup>73</sup> By contrast, French suggests that the concept of uniformity of interpretation, whilst an admirable notion, does not actually match the reality of the international legal system.<sup>74</sup> Thus, he argues that Article 31(3)(c) refers to all those parties involved in the dispute. However, it is suggested that, at least in the case of the LOS Convention, the latter approach is not suitable. The General Assembly has regularly stressed the need to uphold the integrity of the Convention, which calls for a uniform interpretation thereof.<sup>75</sup> Indeed, one of the purposes of compulsory dispute settlement is to guarantee a harmonised interpretation of the Convention. The integrity of the LOS Convention would not be protected if it had different meanings for different parties. At the same time,

<sup>67</sup> *Namibia Advisory Opinion*, *supra*, note 66, at para. 53.

<sup>68</sup> *Iron Rhine Arbitration (Belgium v. Netherlands)* (2005) at para. 80. Available at <<http://www.pca-cpa.org/ENGLISH/RPC/BENL/BE-NL%20Award%20corrected%20200905.pdf>> (checked 30 November 2006).

<sup>69</sup> *Ibid.*, at para. 81.

<sup>70</sup> See *ibid.*, in particular paras. 220–223.

<sup>71</sup> Higgins, *supra*, note 57, at p. 798.

<sup>72</sup> J. Pauwelyn, *Conflicts of Norms in Public International Law* (Cambridge University Press, 2003), at p. 257.

<sup>73</sup> McLachlan, *supra*, note 64, at p. 315.

<sup>74</sup> D. French, “Treaty Interpretation and the Incorporation of Extraneous Legal Rules,” (2006) 55 *International and Comparative Law Quarterly* 281–314, at p. 306.

<sup>75</sup> Note the regular call by the General Assembly for states to ensure the integrity of the Convention; e.g., *Resolution 60/30, Oceans and Law of the Sea*, adopted on 29 November 2005, para. 4.

requiring all the States Parties to the LOS Convention to be bound by an instrument before it can be invoked in interpretation sets a very high threshold. The appropriate approach would appear to be that suggested, *inter alia*, by Pauwelyn, who argues that other instruments may be taken into account in interpretation if they reflect the common intention of the parties, whether or not the parties are actually bound by the instrument.<sup>76</sup>

A study of the few ITLOS decisions to date illustrates that in certain circumstances the Tribunal has been willing to take into account other rules of international law even when there is no express reference to such rules in the text of the Convention. It did so in *The M/V "Saiga" (No. 2)* when it was interpreting Article 94 of the Convention concerning the genuine link between a ship and a flag state.<sup>77</sup> In support of its decision on Article 94, the Tribunal made reference to the 1986 Convention on the Conditions for the Registration of Ships,<sup>78</sup> the 1993 FAO Compliance Agreement, and the 1995 Fish Stocks Agreement,<sup>79</sup> even though none of these instruments had entered into force at the time of the dispute. It should be noted that these references to international instruments only served to support an interpretation that had been arrived at by the Tribunal on other grounds. In this instance, there had apparently been no change in the attitude of states as the subsequent instruments simply confirmed an interpretation that had been arrived at through consideration of the *travaux préparatoires*. Technically, therefore, this was not a case of evolutionary interpretation, but it nevertheless demonstrates the willingness of the Tribunal to look at extrinsic evidence of the parties' expectations.

Yet the basis for taking these other instruments into account was not made clear by the Tribunal. It did not state whether it considered these other instruments to be the practice of the parties in the application of the LOS Convention or other rules of international law relevant to its interpretation. As the instruments were not in force at the time, it is doubtful whether they could be considered rules of international law, unless they are declaratory of custom. At the same time, it is not clear that they are the subsequent practice of the parties in application of the Convention, as the instruments were adopted in very different institutional contexts. If this is the case, however, it suggests a very flexible attitude to what amounts to subsequent practice.

To take another example, in *The M/V "Saiga" (Prompt Release)*, the Tribunal looked to state practice to interpret the phrase "sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone" in Article 73 of the Convention. The Tribunal invoked, *inter alia*, Article 1 of the 1989 Convention for the Prohibition of Fishing with

<sup>76</sup> Pauwelyn, *supra*, note 72, at p. 260. See also McLachlan, *supra*, note 64, at pp. 314–315.

<sup>77</sup> The Tribunal also referred to the drafting history of the provision; see discussion above in the present text under "Travaux Préparatoires".

<sup>78</sup> *M/V "Saiga" (No. 2)*, *supra*, note 50, at para. 84.

<sup>79</sup> *Ibid.*, at para. 85.

Long Driftnets in the South Pacific<sup>80</sup> as evidence of the fact that the concept of fishing activities could include the provision of fuel and other supplies to fishing vessels.<sup>81</sup> However, in this case, not all judges were convinced that this instrument was relevant to Article 73. Vice-President Wolfrum and Judge Yamamoto objected to the invocation of the Driftnet Convention, arguing that the definition of fishing activities therein was agreed on specifically for the purpose of that treaty and it could not simply be transferred to the LOS Convention.<sup>82</sup> They also noted that Article 1 of the Driftnet Convention concerned flag state jurisdiction, not coastal state jurisdiction which was the subject of the provision being interpreted.

This criticism highlights the fact that in order to be taken into account for the purposes of interpretation, the rule or principle must be able to shed light on an ambiguous term in the LOS Convention. Moreover, it cannot always be assumed that two instruments should be interpreted in the exactly same way, simply because they use similar language. In the *MOX Plant Case (Provisional Measures)*, the ITLOS stressed that the distinct identities of two instruments is important. The limitations on invoking other instruments in the interpretative process were noted, as “even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the [LOS] Convention, the rights and obligations under those agreements have a separate existence from those under the [LOS] Convention . . . the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of the parties and *travaux préparatoires*.”<sup>83</sup>

Clearly, there is a fine balance between interpreting a treaty in light of developments in the rules and principles of international law and modifying the terms of a treaty as agreed by the drafters. In the case of the LOS Convention, an adjudicator must be careful that the balance of rights and obligations is not overturned by an overly enthusiastic evolutionary interpretation. It would appear that the predominant approach of the ITLOS to the issue of interpretation leans towards pragmatism. Yet there is a danger in such an approach. The ICJ has stressed on several occasions that treaty interpretation, whether evolutionary or not, should not turn into treaty revision.<sup>84</sup> In order to avoid

<sup>80</sup> Hereinafter referred to as the ‘Driftnet Convention’.

<sup>81</sup> *The M/V “Saiga” (Prompt Release)*, *supra*, note 31, at para. 57.

<sup>82</sup> Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto in *ibid.*, at para. 23.

<sup>83</sup> *The MOX Plant Case*, *supra*, note 56, at paras. 50–51. See also *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention* (2003) 42 International Legal Materials 118, at paras. 101 and 142; *Methanex v. United States* (2005) 44 International Legal Materials 1345, at para. 6.

<sup>84</sup> Separate Opinion of Judge Bejaoui in the *Case Concerning the Gabčíkovo-Nagymaros Project*, *supra*, note 66, at para. 12. See also “Draft Articles on the Law of Treaties: Report of the International Law Commission to the General Assembly,” *supra*, note 60, at p. 219.

this, there must be strong evidence that an evolutionary interpretation is supported by the States Parties. The weakness in the decisions to date is the failure to identify in what capacity other rules of international law have been invoked. Further guidance in this matter would not only clarify the applicable principles, but also add greater legitimacy to the decisions by increasing their transparency.

### Applicable Law

Interpretation is not the only situation in which other rules of international law may be relevant to the task of a court or tribunal acting under the LOS Convention. Article 293 provides that courts and tribunals deciding disputes under the Convention may apply both the Convention and “other rules of international law not incompatible with this Convention.” In this context, other rules of international law can include other treaties, as well as customary international law.

It should be stressed that Article 293 does not act as a *carte blanche* to apply any rules that are applicable between the disputing parties. The concept of applicable law does not enlarge the jurisdiction of a court or tribunal to consider any legal claims arising between the disputing states. Such a liberal concept of applicable law would have the result of converting the jurisdiction of courts and tribunals acting under the LOS Convention into “an unqualified and comprehensive jurisdictional regime in which there would be no limit *ratione materiae*.”<sup>85</sup> In this sense, applicable law and jurisdiction must be clearly distinguished.<sup>86</sup>

What is the purpose of Article 293? It is suggested that this provision permits an adjudicator to apply such rules and principles of international law that are *necessary* in order to decide a dispute under the Convention. Most of the rules that a court or tribunal will have to apply in this way will thus be secondary rules of general international law. The ITLOS has, for instance, referred on several occasions to the law of state responsibility in its judgments. *The M/V “Saiga” (No. 2)* is once again a good illustration of the way in which other rules of international law may be applied. In that case, the Tribunal cited the “well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act”<sup>87</sup> and it made reference to Article 42 of the ILC Draft Articles on State Responsibility which specifies the forms that reparation may take.<sup>88</sup> In addition, the law of state responsibility was relevant to the case

<sup>85</sup> See *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention*, *supra*, note 83, at para. 85; also cited in *Methanex*, *supra*, note 83, at para. 5.

<sup>86</sup> *The MOX Plant Case*, *supra*, note 56, at para. 19.

<sup>87</sup> *The M/V “Saiga” (No. 2)*, *supra*, note 50, at para. 170.

<sup>88</sup> *Ibid.*, at para. 171. The rules of state responsibility are “saved” by Article 304 of the LOS Convention.

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because Guinea had invoked the doctrine of necessity as a defence to the claims submitted against it.<sup>89</sup> In this context, the Tribunal referred to the decision of the ICJ in the *Gabcikovo-Nagymaros Case* as well as Article 33(1) of the Draft Articles on State Responsibility.<sup>90</sup> Whilst it did not deny that necessity could be invoked as a justification for a violation of the Convention, thus affirming the applicability of the law of state responsibility in proceedings under the Convention, the Tribunal nevertheless held that Guinea had not satisfied the Tribunal that its essential interests were in grave and imminent peril.<sup>91</sup> If Article 293 is limited to the application of secondary rules, it will have a limited impact on the application of the substantive norms set out in the LOS Convention.

Yet is it only secondary rules that can be applied in this way? An analysis of *The M/V "Saiga" (No. 2)* suggests not. In that case, Saint Vincent made several claims that had no basis in the Convention itself. First, it alleged that by citing Saint Vincent as civilly liable in connection with criminal proceedings instigated in the domestic courts of Guinea, Guinea had violated its rights under international law.<sup>92</sup> Although the Tribunal dismissed the claim because it did not constitute a violation of international law,<sup>93</sup> in doing so it failed to explain on what basis it would have had jurisdiction to entertain such a claim if it were indeed arguable.

Saint Vincent had also alleged that the Guinean authorities had used excessive and unreasonable force when they were arresting the *M/V "Saiga."* As the Convention does not contain express rules on the use of force in the arrest of ships, the claim was necessarily based on customary international law. Citing the application of international law according to Article 293, the Tribunal held that "international law . . . requires that the use of force must be avoided as far as possible and where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances."<sup>94</sup> To support its reference to general principles of law, the Tribunal referred to the 1995 Fish Stocks Agreement, Article 22(1)(f) of which, it held, confirmed the principles that it thought were applicable. In other words, the Tribunal was not applying the 1995 Agreement; rather it was invoking the Agreement as an illustration of a general principle of law that was applicable to the disputing parties. In the circumstances of the case, the Tribunal held that use of force by the Guinean authorities did not meet these conditions.<sup>95</sup> It is again clear

<sup>89</sup> As a subsidiary argument, Guinea cited Article 59 of the LOS Convention.

<sup>90</sup> *The M/V "Saiga" (No. 2)*, *supra*, note 50, at para. 133.

<sup>91</sup> *Ibid.*, at para. 135.

<sup>92</sup> *Ibid.*, at para. 160.

<sup>93</sup> *Ibid.*, at para. 162.

<sup>94</sup> *Ibid.*, at para. 155.

<sup>95</sup> The Guinean patrol boat had allegedly fired live rounds in their pursuit of the *M/V "Saiga"* and two crew members were injured when the ship was boarded; see *ibid.*, paras. 157–159.

from the judgment that the claims on the unreasonable and unnecessary use of force were considered as separate from the claim alleging a violation of the Convention's provisions on hot pursuit. To consolidate this point, the finding of a violation of the rules of international law on the use of force in the course of the arrest is contained in a separate paragraph of the *dispositif*.<sup>96</sup> Again, given that the jurisdiction of the Tribunal is limited to claims made under the Convention, it is not clear from the judgment on what basis the Tribunal made this finding. Arguably, it is not simply a question of applicable law as is supposed by the Tribunal, and it ignores the crucial distinction between jurisdiction and applicable law outlined above.

Such a flexible approach to applicable law raises the possibility that applicable law may be invoked in order to change the substantive rules of the LOS Convention. There is, however, a limitation created by the Convention itself, as Article 293 appears to prioritise the application of the LOS Convention. Klein comments that "a hierarchy is created whereby the foremost law governing the dispute is the Convention and in the case of conflict between [the LOS Convention] and existing law, the Convention must prevail."<sup>97</sup> Therefore, a court or tribunal acting under the LOS Convention will not be able to override the balance of rights and obligations achieved in the Convention through the application of conflicting sources of law.<sup>98</sup>

Conflicts of law between the LOS Convention and other treaties have not yet been raised in the course of litigation. However, in *The M/V "Saiga" (No. 2)* the Tribunal considered arguments raised by Guinea that its actions were justified because they were taken in order to "protect itself against unwarranted economic activities in its exclusive economic zone that considerably affect its public interest."<sup>99</sup> The Tribunal held that the so-called principle of public interest invoked by Guinea was not compatible with the Convention as it would allow a coastal state to prohibit any activities which it deemed to affect its public interest, unilaterally curtailing the rights of other states in violation of the Convention.<sup>100</sup> Although not explicitly based on the priority of the Convention over other sources of international law, it is an illustration of the importance that the Tribunal accords to upholding the balance of rights and obligations in the Convention.

<sup>96</sup> *Ibid.*, at para. 9 of the *dispositif*.

<sup>97</sup> Klein, *supra*, note 5, at p. 58; see also Rosenne and Sohn (eds.), *supra*, note 2, at p. 73.

<sup>98</sup> In this sense, Article 293 should also be read in the context of other provisions in the Convention which cede priority to other treaties. For instance, Article 301 confirms that the LOS Convention shall be interpreted and applied subject to the UN Charter in accordance with the provisions of Article 103 of that agreement.

<sup>99</sup> *The M/V "Saiga" (No. 2)*, *supra*, note 50, at para. 128.

<sup>100</sup> *Ibid.*, at para. 131.



## Conclusion

This article has considered the role of courts and tribunals in upholding the *status quo* of the LOS Convention whilst satisfying countervailing pressures for progressive development of the legal framework.

The concept of applicable law would appear to offer few opportunities for an adjudicator to develop the law. The mandate to apply other sources of international law arguably does not allow a court to consider claims under other sources of law that are not necessary to decide the dispute under the treaty. Nor can a court or tribunal set aside the Convention through the application of other sources of law, as the Convention assumes priority.

Interpretation is then the principal way in which judges can develop the LOS Convention. In doing so, a court can take note of other rules of international law, thus permitting an interpretation of the LOS Convention which takes into account the current views of the parties. It would appear that a wide variety of instruments may be invoked for this purpose, including *travaux préparatoires*, unilateral statements or declarations, the decisions of international institutions, or other international treaties, as long as they can be shown to be relevant and to command the support of the States Parties.

There would appear to be no fixed formula for determining when sufficient support exists or the form which such support should take. As a result, there is an ambiguity in the general principles of interpretation which consequently confers on the courts a limited degree of discretion. Yet this discretion must be used with care. Interpretation should not be a cloak for the revision of a treaty.

The practice of courts and tribunals to date has not clarified in what circumstances other rules of international law can be used in interpreting the LOS Convention. A pragmatic approach seems to be preferred. Whilst this approach promotes flexibility, it does so at the risk of undermining the transparency and legitimacy of judicial decisions. As it is the persuasiveness of judicial decisions, rather than their formal status, which confers their law-making potential, this risk is one that should not be taken lightly.

Although there is a potential for judicial development of the LOS Convention, it has not been fully realised to date. A reason for this may be that very few substantive disputes have been brought before dispute settlement bodies and many of those decisions have primarily involved procedural points or ancillary issues of law. Indeed, one of the weaknesses of development of a treaty through interpretation is that it relies on cases coming to court in the first place. Taking into account all of these limitations on the role of judges in law-making, substantive and procedural, it is clear that courts by themselves cannot provide a satisfactory mechanism to safeguard the long-term sustainability of a treaty as important and politically sensitive as the LOS Convention.